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# **EUTHANASIA IN AMERICA — PAST, PRESENT, AND FUTURE: A REVIEW OF A MERCIFUL END AND FORCED EXIT**

*Edward J. Larson\**

MERCIFUL END: THE EUTHANASIA MOVEMENT IN MODERN AMERICA. By *Ian Dowbiggin*. New York: Oxford Univ. Press. 2003. Pp. xix, 250. \$28.

FORCED EXIT: THE SLIPPERY SLOPE FROM ASSISTED SUICIDE TO LEGALIZED MURDER. By *Wesley J. Smith*. Dallas: Spence Publ'g Co. 2003. Pp. xxii, 364. Paper, \$17.95.

Nearly 170 years ago, in the classic first volume of his *Democracy in America*, Alexis de Tocqueville observed, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."<sup>1</sup> De Tocqueville viewed this as a peculiarly U.S. development. He attributed it to the authority of the judiciary in the United States to review governmental enactments and establish individual rights based on judicial interpretation of the federal and state constitution. "Whenever a law that the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one peculiar to the U.S. magistrate, but it give rise to immense political influence," de Tocqueville explained.<sup>2</sup> He then commented, "But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force."<sup>3</sup> The same can be said of individual rights: those decreed by the Supreme Court carry added moral force, those denied by that Court carry less moral force. To some extent, Americans conflate morality with constitutionality. The relevance of this observation in a review of two books about efforts to legalize physician-assisted death, Ian Dowbiggin's<sup>4</sup> *A Merciful End* and Wesley

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1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Phillips Bradley ed., Alfred A. Knopf 1945).

2. *Id.* at 101.

3. *Id.* at 102.

4. Professor of History, University of Prince Edward Island.

J. Smith's<sup>5</sup> *Forced Exit*, should become apparent later — but for now, permit me to elaborate on the general observation.

Of course, de Tocqueville's equation of the constitutional, the political, and the moral does not apply in every case. In his majority opinion in the 1857 *Dred Scott* case, Chief Justice Roger Taney articulated a constitutional right for citizens who legally owned slaves under state law to take that "property" into United States territories where slavery was outlawed under federal or territorial statutes.<sup>6</sup> He did this with the hope of resolving the most pressing political and moral question of his day in favor of the extension of slavery into supposedly free territories. The attempt backfired badly as free-soil moderates joined radical abolitionists in denouncing the Court and its ruling. For example, Illinois trial lawyer Abraham Lincoln attributed the judicial decision to the ruling Democratic political dynasty in Washington, and called for the people "to meet and overthrow the power of that dynasty" to prevent it from pushing its pro-slavery agenda through the courts.<sup>7</sup> After he was elected president in 1860 at least in part on his promise to roll back *Dred Scott*, Southern Democrats pushed their states to secede from the Union. The ballot box and the battle field (rather than constitutional adjudication) ultimately resolved that particular political and moral question,<sup>8</sup> with the 13th Amendment effectively overruling *Dred Scott* in 1865.

*Dred Scott* is more the exception than the rule, however. Throughout our nation's history, many hotly contested political issues were resolved, without conflict, by judicial decisions. Three examples spanning the past half-century illustrate the rule. Following a virtual tie in Florida that left no clear winner in the 2000 presidential election, *Bush v. Gore*<sup>9</sup> — despite deep and continuing objections to the case in

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5. Attorney and popular writer.

6. *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).

7. Abraham Lincoln, *A House Divided: Speech Delivered at Springfield, Illinois, at the Close of the Republican State Convention* (June 16, 1856), in *THE NORTON ANTHOLOGY OF AMERICAN LITERATURE* 1587 (Nina Baym et al. eds., 5th ed. 1998).

8. See Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 715-16 (2004) ("It would be an exaggeration to claim that the Civil War repudiated the notion that the Supreme Court's constitutional pronouncements are binding on all other actors in our constitutional system, but not by very much. Lincoln campaigned against the binding nature of *Dred Scott*, other than as a rule of decision for the parties in that particular case. He campaigned against popular acquiescence in a potential "Second *Dred Scott*" opinion that might confirm and extend the original, and introduce a requirement that Northern states tolerate slavery within their borders. In a very real sense, Lincoln's election constituted an electoral rejection of the Supreme Court's supremacy in matters of constitutional law. The South's attempted secession was a rejection of the validity of that electoral rejection and of the constitutional views of the North more generally. Lincoln's rejection of secession, in turn, rejected the legitimacy of the South's constitutional objections. And so the issue was joined, and would be determined on the battlefield.").

9. 531 U.S. 98 (2000).

many quarters — effectively decided the political question of who became president in 2001. Al Gore accepted the Court's majority opinion as final and his partisans did not take to the streets in protest — as perhaps might have happened in countries with a different attitude toward judicial power. Another example occurred a quarter century earlier, when, after months of resisting judicial and congressional subpoenas, President Richard Nixon complied with the Supreme Court's order in *United States v. Nixon*<sup>10</sup> directing him to turn over the so-called Watergate tapes to the Watergate special prosecutor. This led to Nixon's resignation from office two weeks later. Here, as in *Gore*, political questions were resolved by judicial decisions. In a yet earlier example, President Dwight Eisenhower sent federal troops into the Deep South to enforce federal court orders decreeing the desegregation of public schools, despite his personal objections to those rulings. He thereby gave teeth to the enforcement of the Court's pronouncements in *Brown v. Board of Education*.<sup>11</sup> Together, those judicial pronouncements and the resultant executive actions led to the end of de jure segregation in public education, which was arguably the most difficult political and moral question of the 1950s.

As a political and moral question in the United States, euthanasia may not rise to the same historic level of significance as school desegregation or the abolition of slavery, but during the 1990s, as *A Merciful End* and *Forced Exit* show, it commanded considerable public attention. Best-selling books, articles, and television programs promoted the concept of mercy killing to a wide audience (*Smith*, pp. 12-35). Activist groups supporting the legalization of physician-assisted suicide or medical euthanasia, such as the Hemlock Society and Compassion in Dying, sprang up and gained visibility (*Smith*, p. 172; *Dowbiggin*, p. 162). Bills on the topic surfaced in state legislatures around the country and voters in five states faced ballot initiatives to legalize physician-assisted suicide, with one of them, the Oregon Death With Dignity Act, passing by a 51% to 49% margin in 1994 (*Dowbiggin*, pp. 167-71).<sup>12</sup> In New York and Washington State, concerned physicians and patients filed suits in federal court to overturn state statutes against assisting suicide.<sup>13</sup>

As those lawsuits wound their way to the United States Supreme Court in 1997,<sup>14</sup> they became the focal point of the political and moral

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10. 418 U.S. 683 (1974).

11. 347 U.S. 483 (1954).

12. In addition to Oregon in 1994, the other four states were Washington (1991), California (1992), Michigan (1998), and Maine (2000).

13. At least in so far as those laws prohibited physicians from honoring requests from competent, terminally ill patients for aid in dying. *Smith*, pp. 161-68.

14. *Vacco v. Quill*, 521 U.S. 793 (1997).

debate over euthanasia in the United States. When the Court handed down its decision refusing to recognize a constitutionally protected liberty interest in physician-assisted suicide, the entire issue largely disappeared from the headlines. The political debate subsided virtually overnight. This occurred despite the fact that the justices — both in the majority and concurring opinions — expressly reserved the matter to resolution through state political processes and did not even purport to have resolved the constitutional issue for all time.<sup>15</sup>

Although *A Merciful End* and the revised and updated edition of *Forced Exit* were published in 2003, they contain surprisingly little about the Supreme Court's 1997 decisions in *Glucksburg* and *Quill*. Although *A Merciful End* purports to cover the history of the euthanasia movement in the United States from roughly 1900 to "the 1990s and beyond" (*Dowbiggin*, p. 163), it relegates this final period to a cursory concluding chapter. *Forced Exit* is not history. It is written in the present tense, but was first published in 1997 (before the Supreme Court rulings). Revisions for the 2003 edition did not alter the book's basic style and substance. Smith made little effort to integrate the Supreme Court rulings into his critique of physician-assisted suicide, perhaps because they did not neatly fit his slippery-slope analysis. These two books tell us much about the public debate before the Supreme Court rulings, but little about those rulings or their aftermath. In this review, I will summarize and comment on both books as well as the Supreme Court's opinions in *Glucksburg* and *Quill*.

## I. A MERCIFUL END

The misappropriately (or perhaps ironically) titled book, *A Merciful End*, is a history of the euthanasia movement in the United States that portrays its leaders as only secondarily interested in providing a merciful end for suffering patients. Instead, Dowbiggin presents a picture of a movement with deep social Darwinian and eugenic currents (*Dowbiggin*, p. 16). Even for those leaders of the euthanasia movement whose concerns centered on the suffering patient rather than society, Dowbiggin implies that the fruit of their labor may be infected by mistake, abuse, and short-sightedness (*Dowbiggin*, pp. 155-56 (case of Dax Cowert), pp. 164-69 (cases of Nancy Cruzan, "Debbie," and Janet Adkins)).

Although euthanasia has long roots in Western culture, Dowbiggin begins his account around 1990, during the heyday of social Darwinism and the dawn of eugenics. The book's subtitle — "The

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15. *Washington v. Glucksburg*, 521 U.S. 702, 735 (1997); *id.* at 788-89 (Souter, J., concurring).

Euthanasia Movement in Modern America” — is more descriptive of the book’s contents than its title. Euthanasia is revealed to be a very modern way of dying. Dowbiggin depicts the utilitarian, anticlerical, pervasively Darwinian euthanasia movement as an archetypical manifestation of the modern reform impulse. Fittingly, the movement begins in The United States around the turn of the Twentieth Century with champions like Progressive political orator Robert Ingersoll, Ethical Culture movement founder Felix Adler, and popular socialist author Jack London. These and other Progressive Era champions of euthanasia saw suicide as a rational choice for the terminally ill, and mercy killing as appropriate for those suffering severe physical or mental disabilities (*Dowbiggin*, pp. 155-56). Dowbiggin’s account suggests that the United States’ failure to embrace their arguments for euthanasia reflects a cultural hesitancy to accept the full implications of rational modernity, which is characterized by a naturalistic, utilitarian view of life. Perhaps there is some sentiment and superstition left in us, at least when confronted with death.

*A Merciful End* is fundamentally a work of institutional history, and it is the well-researched story of the Euthanasia Society of America (the “ESA”) and successor organizations that the book tells in impressive detail. After chronicling the emergence during the Progressive Era of early calls for legalizing euthanasia, Dowbiggin hits his stride through his description of ESA’s founding during the Great Depression of the 1930s. Charles Francis Potter, a Baptist minister turned radical secularist who founded the New York City Humanist Society, and Ann Mitchell, a New York heiress who Dowbiggin describes as psychologically “unstable,” served as the driving force behind the ESA, at least until Potter resigned as ESA president in 1938 due to inadequate pay and Mitchell jumped from a window to her death in 1942 (*Dowbiggin*, pp. 36-54). Dowbiggin includes such tidbits of ESA history to show the character of its leaders. Potter and Mitchell warmly endorsed eugenics and advocated euthanasia for both the disabled and the terminally ill. As Dowbiggin documents in detail, the small, Manhattan-based organization’s boards and councils were dominated by an elite corps of eugenicists, including modernist minister Henry Emerson Fosdick, progressive sociologist Edward A. Ross, psychologist H. H. Goddard, biologist Arthur Estabrook, birth-control advocate Margaret Sanger, and geneticist C. C. Little (*Dowbiggin*, p. 54).

After a promising start in the 1930s, the euthanasia movement fell on hard times during the 1940s. During the 1930s and early 1940s, the Nazi government in Germany had systematically euthanized large numbers of sick or infirm patients in addition to implementing their final solution for Jews, and Dowbiggin places some of the blame on Germans who supported euthanasia before the war, “no matter what their intentions” (*Dowbiggin*, pp. 67-71). Linking euthanasia to Nazism

discredited the practice in the United States, especially after the United States joined the war against Germany in 1941. Illustrating just how out of step Potter fell from popular opinion as the United States turned against the scientific materialism that characterized Nazi Germany, he actually suggested legalizing euthanasia to provide a "merciful release" for disabled veterans returning from World War Two (*Dowbiggin*, pp. 72-73). By examining the eugenic, utilitarian thinking of early ESA leaders and equating it to the reasoning of German physicians whose support for euthanasia helped lay the foundations for the Nazi death camps, Dowbiggin presents mercy killing for some (at least as conceived during the 1930s) as a slippery slope leading all too predictably to fatal results for many.

Virtually without support in the 1950s, the U.S. euthanasia movement revived in the 1960s and 1970s with a revised agenda. The paramount message became the autonomy of suffering, terminally ill patients to decide when and how their lives should end (*Dowbiggin*, pp. 97-98). Certainly the advent of life-sustaining treatments spurred the quest for greater patient control, but Dowbiggin ties revived interest in euthanasia more to cultural than to medical developments (*Dowbiggin*, pp. 110-18). Individuals simply expected greater control over their bodies; and this shift in public opinion gave new life to the euthanasia movement. Episcopal theologian Joseph Fletcher, an influential proponent of situational ethics, emerged as a leader within the ESA. Aligning itself with these cultural developments, in 1974 the organization also changed its name from the old-fashioned sounding Euthanasia Society of America, replete with Nazi implications, to the more liberal-sounding Society for the Right to Die, in tune with the individual-rights ethos of late twentieth-century America. Showing a similar concern for semantics, its sister organization, the Euthanasia Education Fund, became Concern for Dying soon after. These organizations gradually changed their focus from championing state-sponsored euthanasia to advocating living wills and physician aid in dying — although Fletcher remained an old-line eugenicist who saw social benefit in selective mercy killing (*Dowbiggin*, pp. 100-18). As they changed, he gradually lost influence within them. During the 1980s and early 1990s, Derek Humphry's Hemlock Society and Jack Kevorkian's shock tactics championed some of the ESA's more radical positions as the ESA's own successors moved toward the middle (*Dowbiggin*, pp. 149, 154, 165-67).

*A Merciful End* tracks these historical developments with a critic's eye for details highlighting the elitist or eugenic roots for a movement that now presents itself as promoting individual rights and patient autonomy. Dowbiggin is a historian of medicine, however, not a journalist or lawyer. He all but drops the narrative with the passage of the Oregon Death With Dignity Act in 1994. Readers more interested in current legal developments than the history of a social movement

should be forewarned — Dowbiggin's book barely mentions the Supreme Court rulings in *Quill* and *Glucksberg*, devoting less than a paragraph to those two signal cases before concluding the account a scant three pages later (*Dowbiggin*, p. 173). It tells us nothing of their impact on the ongoing debate, and leaves the reader with the dire warning that "the floodgates dreaded by the anti-euthanasia forces may swing wide open at some point in the not too distant future" (*Dowbiggin*, p. 176).

In the book's concluding paragraph, Dowbiggin throws his lot in with those anti-euthanasia forces. Current proponents of euthanasia may be well-meaning, he writes, and speak of their deep commitment to relieve human suffering. "However, the history of euthanasia in America suggest this is a simplistic diagnosis of a gravely complex social, political, economic, and cultural matter," Dowbiggin concludes. "Talk of a right to die raises the troubling questions: once legalized for the dying, who can be denied such a right?" Once granted to some, many infirm, depressed, or simply suicidal persons might claim it too, he fears, and parents or other surrogate decisionmakers might demand it on behalf of minors or other incompetents. Further, Dowbiggin worries that, once a legal right to die is established, the infirm and disabled might feel obligated to exercise that right to lessen the burden that they impose on society and family members. "Where does the freedom to die end and the duty to die begin?" he asks (*Dowbiggin*, pp. 176-77). These are slippery-slope questions of the type that University of Michigan legal scholar Yale Kamisar has posed with great force against the legalization of euthanasia for nearly fifty years.<sup>16</sup> *A Merciful End* provides a rich historical context for considering these critical questions in light of how past proponents of euthanasia conceptualized the issue. Dowbiggin shows that many leaders of the euthanasia movement in the United States favored a broad right to die and that some acknowledged at least a limited social duty to die in certain circumstances. Their reasoning led in that direction. At least for now, however, the legal limits against assisted suicide and euthanasia have held firm against the best arguments that euthanasia enthusiasts could muster.

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16. See, e.g., Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958); Yale Kamisar, *The Rise and Fall of the "Right" to Assisted Suicide*, in *THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE* 69-93 (Kathleen & Herbert Hendin eds., 2002). In 1994 Kamisar wrote:

Why should the non-terminal nature of a person's suffering disqualify her as a candidate for assisted suicide? If personal autonomy and the termination of suffering are the key factors fueling the right to assisted suicide, how can we exclude those with non-terminal illnesses or disabilities who might have to endure greater suffering over a much longer period of time? Why should a quadriplegic or a person afflicted with severe arthritis have to continue to live what she considers an intolerable existence for a number of years? Why doesn't such a person have an equal claim — or even a greater one — to assisted suicide?

Yale Kamisar, *After Assisted Suicide, What Next?*, *LEGAL TIMES*, May 30, 1994, at 26.



## II. FORCED EXIT

Where *A Merciful End* looks to the history of the euthanasia movement, *Forced Exit* focuses on its present manifestation, at least as author Wesley J. Smith viewed it in 1997, when he initially published the book. In 1994, Oregon passed its Death With Dignity Act, enacted as a voter initiative to authorize physicians to prescribe lethal drugs in certain cases to their competent, terminally ill patients. In 1996, two federal appellate courts held that the due process or equal protection clauses of the Fourteenth Amendment barred states from prohibiting physician-assisted suicide.<sup>17</sup> To Smith, it seemed as if the media were promoting physician-assisted suicide as well. Smith wrote *Forced Exit* in response to a friend's suicide after discovering that the friend had been encouraged by literature from Hemlock Society. His purpose in writing the book was to expose the slippery-slope-type dangers posed by physician-assisted suicide and denounce the legal and cultural inroads the euthanasia movement had made in recent years (*Smith*, pp. xviii-xxix).

A lawyer and writer of popular, advocacy-oriented books, including four with consumer advocate Ralph Nader, Smith's *Forced Exit* assaults physician-assisted suicide much like Nader's *Unsafe at Any Speed*<sup>18</sup> assaulted Corvairs — with a drumbeat of emotional examples and frightening facts aimed at a popular audience. The book's subtitle summarizes its argument: "The Slippery Slope from Assisted Suicide to Legalized Murder." As Smith presents it, this slippery slope is a greased slide. Even though the Supreme Court in *Glicksburg* and *Quill* reversed the two appellate court decisions (*Smith*, p. 168 (addition to 2003 edition)), no state has followed Oregon's lead in legalizing physician-assisted suicide (*Smith*, pp. 264-65 (addition to 2003 edition)), and media attention to the issue has lessened, the 2003 edition of *Forced Exit* is as shrill as the 1997 edition. Smith has added a paragraph here or a sentence there to reflect intervening developments, but the substance remains the same. He has neither deleted nor rewritten anything of significance from the 1997 text.

A vitriolic, two-part thesis runs through *Forced Exit* from the first to the last page. As Smith sees it, legally allowing patients of any particular type (such as the terminally ill or the severely disabled) either to die or to choose death represents a societal decision to discount the value of those persons. He fears that once some are viewed as expendable, others will be as well. He sets the tone in

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17. *Compassion in Dying v. State*, 79 F.3d 790 (9th Cir. 1996) (due process); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (equal protection).

18. RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

Chapter One by linking the current “euthanasia consciousness” (Smith, p. 18) to the “quality-of-life ethic” espoused by Princeton University ethicist Peter Singer, whose 1994 book *Rethinking Life and Death*<sup>19</sup> Smith damns as “the *Mein Kampf* of the euthanasia movement” (Smith, p. 25).

In Chapter Two, Smith pushes his thesis through case studies. He tells the stories of four severely cognitively disabled patients, including Nancy Cruzan, who, during the late 1980s or early 1990s, became the subject of highly publicized legal battles over the termination of artificially administered nutrition and hydration (or food and fluid) (Smith, pp. 53-56). None of these patients could speak to request the termination of treatment. Family members purported to speak for them. Smith presents these patients as victims of a legal system that allowed others to decide their fate. He titles the chapter, “Disposable People.” It concludes with the warning, “The food and fluids cases have desensitized people to medical killing, leading to wider application of induced death as the answer to serious maladies” (Smith, p. 80). Smith claims that “the dehydration cases have been used as a springboard for arguments to legalize euthanasia and assisted suicide for the many” (Smith, p. 80). Here is the slippery-slope argument pushed back by Smith to indict an earlier, generally settled legal precedent, articulated in *Cruzan v. Director*<sup>20</sup> and elsewhere, holding that severely disabled or terminally ill patients have a constitutional right to refuse life-prolonging nutrition and hydration either themselves or through a surrogate acting on their behalf. Rather than see this right as affirming a person’s autonomy in medical decisionmaking, Smith condemns it as denying the patient’s human worth by allowing them to die by discontinuing food and fluids.<sup>21</sup> Depending on the particular case, either view could be valid — but *Cruzan* seemingly settled the matter in favor of autonomy in 1990, by which time most states had enacted some statutory procedures for individuals to refuse life-sustaining treatment, including artificially administered nutrition and hydration.<sup>22</sup>

Chapter Three recounts the horrors of Nazi euthanasia practices, which began in 1939 with the killing of severely handicapped

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19. PETER SINGER, *RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS* (1994).

20. 497 U.S. 261 (1990).

21. In the course of discussing these cases, Smith writes, “Once we accept the idea that some lives are not worth living, once we come to see as proper the intentional ending of lives of the profoundly disabled, once we claim the right to judge who should live and die on the basis of subjective standards such as happiness, quality of life, or dignity, we have created a disposable caste.” Pp. 71-72.

22. See Thomas A. Eaton & Edward J. Larson, *Experimenting with the “Right to Die” in the Laboratory of the States*, 25 GA. L. REV. 1253, 1300-1318 (1991).

newborns but quickly spread to include some mentally and physically disabled adults and other so-called “useless eaters” (*Smith*, pp. 84-97). In accord with the chapter’s title, “Everything Old Is New Again,” Smith proceeds to argue that the United States is sliding in the same direction, using as evidence selected quotes from Judge Steven Reinhardt’s 1996 majority opinion in the Ninth Circuit decision finding a constitutional right to physician-assisted suicide.<sup>23</sup> Attempting to show parallels in their reasoning, Smith sets Reinhardt’s statements against those of early proponents of the German euthanasia program (*Smith*, pp. 100-02). This is an untenable jump. Reinhardt was addressing the compelling case of conscious, terminally-ill, pain-racked patients who knowingly request a physician’s aid in dying; the Nazi euthanasia program disposed of the disabled without their consent based on social considerations. The two are fundamentally different.

Having presented the two extremes — the right to refuse life-sustaining medical treatment and the Nazi gas chambers — the ensuing chapters attempt to fill in the connecting links. There are chapters on the ongoing Dutch experiment with legalized medical euthanasia (highlighting how that program has, despite legal guidelines to the contrary, expanded beyond consenting, terminally ill adults), the effort to legalize physician-assisted suicide in various states within the United States, the supposed financial incentives within the United States’ healthcare system that might encourage the practice of euthanasia in some cases, and the alleged cultural bias against disabled or dying individuals that sees their lives as not worth living. These are standard arguments against opening the door even a crack to euthanasia, restated here with considerable force. In the course of raising these objections to physician-assisted suicide, Smith attempts to answer the common claims that euthanasia promotes individual freedom and autonomy. In his calculus, the risks of mistake, abuse, and malice in the practice of euthanasia outweigh any potential benefits. “Legalizing killing by doctors could even become a way for a few very unscrupulous doctors to cover up their malpractice,” Smith claims at one point (*Smith*, p. 190). *Forced Exit* concludes with a plea for providing better care and more compassion for the dying and disabled. Hospice and pain-management are Smith’s answers to calls for death with dignity. In his brief final paragraph, Smith writes: “The two paths that lie before us, the death culture or the struggle toward a truly caring community, lead to dramatically different futures. The choice is ours. So will be the society we create” (*Smith*, p. 316). *Forced Exit* is one long polemic against physician-assisted suicide, medical euthanasia, and the right to terminate life-sustaining treatment, yet it

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23. *Compassion in Dying*, 79 F.3d 790 (9th Cir. 1996).

relies almost exclusively on slippery-slope reasoning. To accept his conclusion, one must accept his reasoning — that physician-assisted suicide, once legal, will snowball.

### III. *GLUCKSBERG* AND *QUILL*

Perhaps because of their scope or purpose, neither book offers a sustained analysis of the Supreme Court's 1997 *Glucksberg* and *Quill* decisions or their impact on the euthanasia movement in the United States. By their terms, those decisions should not end the debate over physician-assisted suicide and euthanasia and this alone could justify Dowbiggin and Smith in ignoring their impact on that debate.<sup>24</sup> To the contrary, the Court purports simply to shift the debate from federal courts into legislative chambers and the public square.<sup>25</sup> For a topic like euthanasia, which potentially impacts all Americans, I find this healthy — and generally agree with the Court here. Nevertheless, I believe that the decisions have profoundly impacted the policy debate — perhaps more than the justices expected. Although all nine justices agreed that states could constitutionally outlaw physician-assisted suicide, they differed somewhat in their reasoning.

Chief Justice William Rehnquist wrote the two opinions of the Court (one in *Glucksberg* and the other in *Quill*) in which five of the nine justices joined. In upholding the Washington statute in *Glucksberg*, he wrote, "[T]he question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."<sup>26</sup> To answer this question, the Chief Justice adopted what he described as the "established method of substantive-due-process analysis,"<sup>27</sup> which begins with the principle "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"<sup>28</sup> In the course of his subsequent review of the relevant history and tradition, he concluded that to find such a right to assisted suicide, "we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."<sup>29</sup> So stated, such a finding would fly in the face of the nation's

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24. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 787-88 (1997).

25. See, e.g., *id.* at 735; *id.* at 736 (O'Connor, J., concurring).

26. *Id.* at 723.

27. *Id.* at 720.

28. *Id.* at 720-21.

29. *Id.* at 723.

history and tradition. That, he suggested, is not the Court's role in a democratic society.<sup>30</sup>

In his separate opinion upholding the New York statute, the Chief Justice rejected the corollary equal-protection argument embraced by the appellate court in *Quill*. The constitutional guarantee of equal protection does not require a state, simply because it allows terminally ill persons on life support to die by having their physicians discontinue life-sustaining treatment, to also allow terminally ill patients not on life support to die by having their physicians supply life-ending treatment.<sup>31</sup> The two classes are not equivalent. Rehnquist reasoned:

This conclusion depends on the submission that ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide." Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational.<sup>32</sup>

In both opinions, the Chief Justice described legitimate governmental interests served by outlawing physician-assisted suicide and distinguishing between what he characterized as "letting a patient die and making that patient die."<sup>33</sup> As he summarized them, those interests include "prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia."<sup>34</sup> Yet the Court did not purport to see those interests as so compelling or certain as to bar states from legalizing physician-assisted suicide. Indeed, the Chief Justice noted "We need not weigh exactly the relative strengths of these various interests,"<sup>35</sup> and appended a concluding observation: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."<sup>36</sup> Indeed, as suggested by the Chief Justice's earlier comment about the absence of a historical tradition for physician-assisted suicide in the United States, this debate is largely a

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30. *Id.* at 719, 735.

31. *Vacco v. Quill*, 521 U.S. 793, 809 (1997).

32. *Id.* at 800-01 (citing *Quill v. Vacco*, 80 F.3d 716, 729 (1996)).

33. *Vacco*, 521 U.S. at 807; see also *id.* at 806-09 (discussing the governmental interests served by outlawing physician-assisted suicide); *Glucksberg*, 521 U.S. at 728-36 (same).

34. *Vacco*, 521 U.S. at 808-09.

35. *Glucksberg*, 521 U.S. at 735.

36. *Id.*

new one in our country. For him, this makes it all the more appropriate for legislative rather than judicial resolution at this time.

Although they concurred in the judgment upholding these two state laws against assisted suicide, five of the Court's more moderate or liberal justices filed or joined separate opinions expressing their views on the limits of state power to ban physician aid in dying. For example, in their concurring opinions, Justices Stephen Breyer and Sandra Day O'Connor stressed that the availability of palliative care weighed heavily in their decisions to reject the claimed right to physician-assisted suicide.<sup>37</sup> "That is because, in my view, the avoidance of severe physical pain (connected with death) would have to constitute an essential part of any successful claim and because, as Justice O'Connor points out, the laws before us do not *force* a dying person to undergo that kind of pain," Breyer wrote.<sup>38</sup> "Medical technology, we are repeatedly told, makes the administration of pain-relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean not pain, but the need for sedation which can end in a coma," he added.<sup>39</sup> Given such pain-control options, O'Connor wrote in her opinion, "the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide."<sup>40</sup> For these justices, this societal interest in protecting these large classes of vulnerable patients outweighed the individual interests of the few competent, terminally-ill patients who might voluntarily decide to hasten death. As O'Connor stated, "The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here."<sup>41</sup>

Although agreeing that the "*potential* harms [associated with the practice of physician-assisted suicide] are sufficient to support the State's general public policy against assisted suicide,"<sup>42</sup> Justice John Paul Stevens carried the concern about unmanageable pain a step further, and expanded it to include suffering generally.<sup>43</sup> "Encouraging the development and ensuring the availability of adequate pain

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37. *Id.* at 791-92 (Breyer, J., concurring); *id.* at 736-38 (O'Connor, J., concurring).

38. *Id.* at 791 (Breyer, J., concurring).

39. *Id.* at 791-92 (Breyer, J., concurring). Justices Breyer and Ruth Bader Ginsburg joined O'Connor's opinion.

40. *Id.* at 737 (O'Connor, J., concurring).

41. *Id.* at 738 (O'Connor, J., concurring).

42. *Id.* at 749 (Stevens, J., concurring).

43. *Id.* at 746-48 (Stevens, J., concurring).

treatment is of utmost importance; palliative care, however, cannot alleviate all pain and suffering,” he noted in his concurring opinion.<sup>44</sup> “An individual adequately informed of the care alternatives thus might make a rational choice for assisted suicide. For such an individual, the State’s interest in preventing potential abuse and mistake is only minimally implicated,” Stevens asserted.<sup>45</sup> Such an individual might possess a constitutionally recognizable right to assisted suicide, he suggested, though not necessarily one that would overturn general state laws against assisted suicide.<sup>46</sup>

Justice David Souter placed even stronger qualifications on his concurrence in upholding the assisted-suicide statutes. “The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death,” he wrote.<sup>47</sup> “In my judgment, the importance of the individual interest here . . . cannot be gainsaid.”<sup>48</sup> Yet he concluded that, at least for now, it was outweighed by the state’s interests in “protecting life generally, discouraging suicide even if knowing and voluntary, and protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary.”<sup>49</sup> In Souter’s opinion, “The case for the slippery slope is fairly made out here . . . because there is a plausible case that the right claimed would not be readily containable.” The case is only plausible, he stressed, and opined that the evidence on this point from “the Dutch experience” was mixed.<sup>50</sup> Souter concluded, “The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.”<sup>51</sup>

Such concerns and qualifications led the concurring justices to amplify the Chief Justice’s call for state legislatures to address the issue.<sup>52</sup> In an opinion joined by Ginsburg and Breyer, O’Connor wrote:

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44. *Id.* at 747 (Stevens, J., concurring).

45. *Id.* at 748 (Stevens, J., concurring).

46. *Id.* at 749-50 (Stevens, J., concurring).

47. *Id.* at 779 (Souter, J., concurring).

48. *Id.* at 782 (Souter, J., concurring).

49. *Id.* (citations omitted).

50. *Id.* at 785-86 (Souter, J., concurring).

51. *Id.* at 786 (Souter, J., concurring).

52. *Id.* at 735.

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.<sup>53</sup>

In his opinion, Stevens added, "There remains room for vigorous debate about the outcome of particular cases that are not necessarily resolved by the opinions announced today."<sup>54</sup> For his part, Souter all but demanded legislative "experimentation" with "an emerging issue like assisted suicide."<sup>55</sup> Although conceding that the judiciary should "stay its hand to allow reasonable legislative consideration" of the issue, he warned, "I do not decide for all time that respondents' claim [of a right to physician-assisted suicide] should not be recognized."<sup>56</sup>

#### IV. CONCLUSION: DEATH AFTER *GLUCKSBERG* AND *QUILL*

Taken together, these various opinions by the justices in *Glucksberg* and *Quill* suggest that, far from resolving the issue of euthanasia, the Supreme Court rulings should simply have opened a new, and probably more intense, phase of the public-policy debate over physician-assisted suicide and medical euthanasia. That has not happened. The national conversation on these issues has been muted since the Supreme Court spoke. There have been only two voter initiatives or referendums on physician-assisted suicide since 1997, one in Michigan and another in Maine. Both lost without generating much national attention (Smith, p. 171). In *A Merciful End*, Dowbiggin characterized them as "demoralizing defeats for right-to-die proponents" (Dowbiggin, p. xviii.) In his concurring opinion in *Glucksberg*, Justice Souter suggested that in-depth analysis of "the Dutch experience" with medical euthanasia might resolve the U.S. public-policy debate over the issue, but leading researchers continue to disagree over the lessons learned from that experience.<sup>57</sup> In their books, both Dowbiggin and Smith report that, in all too many cases, Dutch physicians violate the law by euthanizing patients without their consent (Dowbiggin, p. 169; Smith, pp. 114-20).

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53. *Id.* at 737 (O'Connor, J., concurring).

54. *Id.* at 752 (Stevens, J., concurring).

55. *Id.* at 789 (Souter, J., concurring).

56. *Id.*

57. Compare ROBERT POOL, *NEGOTIATING A GOOD DEATH: EUTHANASIA IN THE NETHERLANDS* (2000) (favorable), with HERBERT HENDIN, *SEDUCED BY DEATH: DOCTORS, PATIENTS, AND ASSISTED SUICIDE* (1998) (unfavorable).



Souter concluded his concurring opinion by urging more state legislatures to experiment with legalizing physician-assisted suicide,<sup>58</sup> but this too has not happened. Since voter passage of Oregon's Death With Dignity Act, no state has legalized physician-assisted suicide and three states have enacted specific prohibitions against assisted suicide (*Smith*, p. 171, 265). Shortly after the Supreme Court issued its rulings in *Glucksberg* and *Quill*, the Florida Supreme Court refused to find a right to physician-assisted suicide under its state constitution.<sup>59</sup> The Alaska Supreme Court reached a similar conclusion under its state constitution in 2001.<sup>60</sup> Jack Kevorkian's renegade experiment in physician-assisted suicide and medical euthanasia ended in 1999 with his conviction of a second-degree charge in a euthanasia case (*Dowbiggin*, p. xi). Since 2001, the Bush Administration has attempted, so far without success, to halt Oregon's experiment with physician-assisted suicide by claiming that it violated the federal Controlled Substances Act (*Smith*, p. 276).

As the only place in the United States where physicians can legally assist patients in committing suicide, Oregon has quietly proceeded with its experiment in doctor-aided death. Sixteen persons died by physician-assisted suicide in Oregon during 1998, the first year it was legal. The number rose to twenty-seven during each of the following two years, dropped to twenty-one in 2001, then rose to thirty-eight in 2002, and forty-two in 2003.<sup>61</sup> In any given year, about two-thirds of the patients who request and receive a prescription for lethal medication actually use the drugs.<sup>62</sup> In reporting the higher figures for 2002, an article in the state's largest newspaper noted: "Assisted suicide accounts for a tiny fraction of deaths in Oregon — about one in 1,000. The total remains lower than proponents expected and opponents feared in 1988 when Oregon became the only state to legalize physician-assisted suicide."<sup>63</sup> In contrast, the rate of death by physician-assisted suicide or medical euthanasia is 100-times higher in the Netherlands (*See Smith*, p. 119). People using the Oregon law were mostly older state residents with cancer or Lou Gehrig's disease. Most

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58. *Glucksberg*, 521 U.S. at 789 (describing such "experimentation" as "entirely proper" and "highly desirable").

59. *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997).

60. *Sampson v. State*, 31 P.3d 88 (Alaska 2001).

61. Don Colburn, *Assisted Suicide Numbers Surge*, THE OREGONIAN (Portland), Mar. 6, 2003, at A1 (providing statistics for 1998 to 2002); John Schwartz & James Estrin, *In Oregon, Choosing Death Over Suffering*, N.Y. TIMES, June 1, 2004, at F1 (providing statistics for 2003 and on percentage of patients taking the drugs).

62. Schwartz & Estrin, *supra* note 61, at F1.

63. Colburn, *supra* note 61, at A1. Similarly, in reporting the figures for 2003, the *New York Times* article commented, "Perhaps the most surprising thing to emerge from Oregon is how rarely the law has actually been used." Schwartz & Estrin, *supra* note 61, at F1.

were white and had medical insurance.<sup>64</sup> “It is almost as if Oregon were the calm center in the heart of the storm over this issue,” commented Dr. Joanne Lynn, a national expert on end-of-life medical care who has staunchly opposed legalizing euthanasia.<sup>65</sup>

In *Forced Exit*, Smith paints as bleak a picture as possible of the Oregon experiment, yet even he concedes that “it is hard to tell” how the law is working.<sup>66</sup> If anything, the Oregon experience should lessen fears that physician-assisted suicide, once legalized, will expand beyond bounds. The lesson from Dowbiggin’s history and the warnings in Smith’s account notwithstanding, perhaps the procedure can be confined to consenting, terminally-ill adults. That has been the case in Oregon where, with few exceptions, the precise limits imposed by the Death with Dignity Act have been followed.<sup>67</sup>

In his 1997 introduction to the first edition of *Forced Exit*, written before the Supreme Court decisions in *Glucksberg* and *Quill*, Smith foresaw a steady spread of physician-assisted suicide and euthanasia in The United States — he called it a “moral trickle-down” (*Smith*, p. xxvi). In his 2003 introduction to the revised edition of the same book, he admitted that “it hasn’t happened yet” (*Smith*, p. xii). “Why this turnaround when assisted suicide threatened to sweep the country?” he asked in the revised edition (*Smith*, p. 171). The Supreme Court’s decision in *Glucksberg* and *Vacco* must have been a critical factor. Smith characterizes them as “devastating losses for the assisted suicide movement” (*Smith*, p. 170). Dowbiggin suggests as much and speaks of the present “impasse” that the euthanasia movement has reached (*Dowbiggin*, pp. 173-76). Neither author elaborates on this point, and surely there were other factors involved. Yet just when the euthanasia movement appeared on the verge of a breakthrough following the passage of the Oregon Death With Dignity Act and victories in two federal circuit courts, the Supreme Court rulings stopped it cold, perhaps because they were unanimous, with forceful opinions from justices representing various judicial philosophies. Even though the justices expressed the hope and expectation that their constitutional ruling would not resolve the legal and political debate over physician-assisted suicide, it seems to have done just that — at least in the short run. The credence given by all the justices to slippery-slope arguments against legalizing physician-assisted suicide may have given many people pause. De Tocqueville would have been impressed with the

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64. Colburn, *supra* note 61, at A11; *Facing Death*, THE OREGONIAN (Portland), Mar. 7, 2003, at C12.

65. Don Colburn, *Assisted Suicide Rate is Steady*, THE OREGONIAN (Portland), Feb. 7, 2001, at A1.

66. *Smith*, pp.154-61 (quote at 154).

67. The exceptions are so rare that even alleged ones make national news. See, e.g., John Schwartz, *Questions on Safeguards in Suicide Law*, N.Y. TIMES, May 7, 2004, at A22.

deference paid to judicial opinion, but perhaps not surprised. Remember his observation about statutes losing moral force in the United States once a judge finds them unconstitutional. *Glucksberg* and *Quill* offer the parallel instance of disputed statutes against assisting suicide gaining moral force when the Supreme Court upheld them as constitutional.